Supreme Court, U. S.
FILED
FEB 10 1979
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1125

The Honorable JOE J. FISHER,
United States District Judge,
Petitioner,

v.

COOPER TIRE & RUBBER COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

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February 9, 1979

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In The

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v.

COOPER TIRE & RUBBER COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The United States Supreme Court:

Respondent, COOPER TIRE & RUBBER COMPANY, respectfully submits this brief in opposition to the petition for writ of certiorari, seeking review of the issuance of a writ of mandamus by the United Sates Court of Appeals for the Fifth Circuit to the petitioner, The Honorable JOE J. FISHER, United States District Judge for the Eastern District of Texas, ordering him to transfer a case from his district to the Northern District of Texas.

For clarity, special reference is made to the parties. Reference to the named petitioner is by "District Court;" reference to the true petitioners, the Davidson plaintiffs, is by

"plaintiffs;" and reference to the respondent, defendant Cooper Tire, is by "defendent."

QUESTIONS PRESENTED

Believing that plaintiffs have failed to accurately identify the issues, defendant restates the questions presented by this appeal:

1. Is mandamus an appropriate remedy for a clear abuse of discretion in denying a 28 U.S.C. §1404(a) motion to transfer?
2. Is the "great writ" of 28 U.S.C. §1651(a) limited to "protection of appellate jurisdiction" upon transfer of a case from one circuit to another?
3. Does an absolute right exist to answer a petition for rehearing or is it merely discretionary with the court?
4. Does the decision of the Fifth Circuit in this case conflict with the decision of any sister circuit?

STATEMENT OF THE CASE

The Davidson plaintiffs correctly state the procedural posture of the case but fail to state any of the underlying operational facts. This is an ordinary products liability case. As a result of a one-car accident allegedly caused by a defective tire, the plaintiffs sued defendent Cooper, the manufacturer of the tire, in the Eastern District of Texas. Defendant moved to transfer the case to the Northern District of Texas pursuant to 28 U.S.C. §1404(a).

The District Court denied the motion shortly after filing without a hearing and before any discovery (*see* APPENDIX

A).[1] Defendant then petitioned for writ of mandamus to the Fifth Circuit, which ordered a response by plaintiffs (B-1). After submission of briefs by both plaintiffs and defendant, the Fifth Circuit denied the mandamus but ruled that any denial or grant of the motion to transfer by the District Court "was premature" (B-2,3). The Fifth Circuit also ruled that the facts alleged by defendant "make a compelling case for a transfer;" hence, defendant could renew its motion upon completion of discovery (B-2,3).

Discovery was promply instituted. The result of that discovery is shown by defendant's renewed motion to transfer.[2] As detailed by that renewed motion, discovery revealed no connection then existed between plaintiffs' claim and the Eastern District of Texas, except one of plaintiffs' attorneys resided in that district. Specifically, all of the following operational facts occurred within the Northern District of Texas:

(1) occurrence of the single car accident;
(2) the residence of all plaintiffs;
(3) the hospitalization of the injured plaintiff;
(4) the treatment of the injured plaintiff by seven doctors;
(5) the location of all medical records;
(6) the residence of the passenger witness;
(7) the residence of the investigating officer;
(8) the original purchase of the tire;

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[1] The appendices to which various references are made in this statement are those appendices attached to the PETITION FOR WRIT OF CERTIORARI. Further references to the appendices attached to the petition are by the capital letter of the appendix, followed by the page number of the appendix, such as "B-1, E-2," and so forth.

[2] The renewed motion to transfer is attached to this brief as Exhibit A.

(9) the residence of the original purchaser (not a plaintiff) of the tire;

(10) the residence of the original vendor of the tire;

(11) the residence of the witness who dismounted the tire; and

(12) the residence of plaintiffs' expert witness on the tire.

At the time of the filing of the renewed motion, all of the above witnesses, some fifteen in number, resided in the Northern District of Texas.

Following answer by the plaintiffs to the renewed motion to transfer and submission of briefs by both sides, the District Court heard the renewed motion (E-1). By the time of the hearing,[3] plaintiffs had contacted six other potential expert witnesses, some of whom had a "connection" with the Eastern District of Texas. As factually developed at the hearing, these new witnesses included: a local medical doctor (who first examined the plaintiff on the date of the hearing); a local tire expert; a local life expectancy witness; a Florida human factors witness; a Louisiana photographer; and an Austin, Texas, rehabilitation expert.

Other than the three recently contacted Eastern District witnesses and one attorney for the plaintiffs, no other connection existed between plaintiffs' claim and the Eastern District. Defendant, a foreign corporation, had qualified to do business in Texas but only had a registered agent and office in the Northern District of Texas, as shown by the attached renewed motion. As also shown by the renewed motion, the tire in issue was not manufactured in Texas and was originally

[3] The transcription of the hearing was attached to the renewed petition for mandamus, along with all factual affidavits and the material portions of the depositions.

introduced into commerce in the Northern District of Texas.

Following the hearing on the renewed motion, the District Court again denied the motion to transfer (E-1). Defendant again petitioned the Fifth Circuit for writ of mandamus, which peition attached all of the material motions, briefs, orders, affidavits and discovery. The Fifth Circuit originally denied the writ (G-1), following which defendant petitioned for rehearing *en banc*. The writ of mandamus was finally granted on rehearing (H-1), without additonal briefing by the parties.

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY INVOKED THE REMEDY OF MANDAMUS, BECAUSE THIS COURT HAS SETTLED THE QUESTION THAT USE OF THE "GREAT WRIT" APPLIES TO ANY CLEAR ABUSE OF DISCRETION, SUCH AS THE "BLATANT FORUM SHOPPING" HERE PRESENT.

A. No real doubt remains that the "naked power" of the writ of mandamus can be used to correct a clear abuse of discretion.

Plaintiffs argue that this court has never directly decided the propriety of use of mandamus by a court of appeals as a remedy in the disposition of 28 U.S.C. §1404(a) motions. While this court has never made such an express holding, this court has settled the question that the use of the "great writ" of mandamus is appropriately issued when there is a clear abuse of discretion. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); and *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953). As expressly noted in *La Buy*, at 255, 257, no question exists as to

the "naked power" to issue the writ for a clear abuse. Such "naked power" extends to use of mandamus for a denial to transfer under a §1404(a) motion. *Pacific Car & Foundary Co. v. Pence*, 403 F.2d 949, 952 (9th Cir. 1968).

In addition, while this court has never expressly approved the use of the writ, it also has never questioned the use of the writ. In *Hoffman v. Blaski*, 363 U.S. 335 (1960), neither the parties nor this court questioned the propriety of mandamus by a court of appeals as a remedy to review denial of a §1404(a) motion. Such a refusal by this court to question the propriety of mandamus continued in *Van Dusen v. Barrack*, 376 U.S. 612, 615, fn. 3 (1964).

When this refusal to question the propriety of the use of mandamus is juxtaposed with the settled use of the great writ for any clear abuse of discretion, no important federal question remains. All that remains in any case is to test for a clear abuse of discretion. Therefore, the application of such a settled test hardly requires the grant of certiorari.

B. Mandamus applies under 28 U.S.C. §1651(a) without regard to whether a §1404(a) motion to transfer is granted or denied.

Plaintiffs alternatively assert that if mandamus is a proper remedy, such a remedy applies only when the district court grants a §1404(a) motion and transfers the case out of its appellate district. The plaintiffs reason that only where the transfer is to a different appellate circuit is there an "appropriate aid" of jurisdiction pursuant to the All Writs Act, 28 U.S.C. §1651(a). Plaintiffs cite only *In Re Josephson*, 218 F. 2d 174 (1st Cir. 1954), a case which does contain language supportive of plaintiffs' argument.

What plaintiffs fail to mention, however, is that the *Josephson* rationale has been firmly rejected by this court. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); and 9 MOORE'S FEDERAL PRACTICE §110.28, fn. 2. For application of the rule in the circuit courts, consult *General Tire & Rubber Co. v. Watkins*, 373 F.2d 361 (5th Cir. 1967). Under these authorities, 28 U.S.C. §1651(a) mandates use of mandamus to correct a clear abuse of discretion without regard to frustration of review on appeal after final judgment.

In sum, this court has settled the use of the great writ for any clear abuse of discretion without regard to frustration of appellate jurisdiction. Thus, writ of certiorari becomes wholly unnecessary in light of the clear abuse here present.

II. THE COURT OF APPEALS CORRECTLY GRANTED MANDAMUS ON PETITION FOR REHEARING AFTER BRIEFING BY BOTH PARTIES, BECAUSE A CLEAR ABUSE OF DISCRETION EXISTED, A DECISION NOT IN CONFLICT WITH ANY DECISION OF ANOTHER COURT.

A. No absolute right is given by FED.R.APP.P. 40(a) to reply to a petition for rehearing, and especially where both parties have briefed the issue.

Plaintiffs next claim that the action of the Fifth Circuit creates a conflict of decisions. In introducing their argument, plaintiffs initially assert that the Fifth Circuit abused its discretion because if failed to consider both sides of the question, citing in support *Will v. United States*, 389 U.S. 909 (1967). *Will*, however, has no application, because that case rested on the principle that a court should write an opinion

giving a statement of its legal reasons as sufficient grounds for granting the writ. Therefore, the argument must initially fail, because the Fifth Circuit wrote such an opinion, finding this case to be a "blatant example of forum shopping" (H-2).

In reality, what the plaintiffs seek to assert is that they were denied an opportunity to submit another brief. Plaintiffs, however, miss the point. The Fifth Circuit here granted mandamus on petition for rehearing *en banc* pursuant to FED.R.APP.P. 40(a). This rule only indicates that a court of appeals ordinarily will not grant rehearing unless it has first requested an answer. Thus, stating what ordinarily occurs hardly amounts to either a requirement or an abuse of discretion.

Factually, and as dictated by common sense, the Fifth Circuit had no need to require an answer to grant the mandamus upon peition for rehearing. The parties had twice briefed the issue in the District Court. The parties again briefed the case at the initial mandamus stage. Then, defendant not only briefed the case in its renewed petition for mandamus but, in addition, attached to that renewed petition, the material motions, affidavits, discovery and briefing for both sides. Thus, plaintiffs were hardly denied an opportunity to make known their position to the Fifth Circuit. After all, plaintiffs could well have petitioned for rehearing following the grant of the mandamus.

In short, the Fifth Circuit properly stated its rationale, followed the applicable rules and properly reviewed all competing arguments. Nothing more should be required.

B. No conflict exists between the decision in this case, applying a clear abuse standard, and any other case from another circuit.

The plaintiffs next move to establish an asserted conflict of decisions, by urging that the Fifth Circuit adopted a liberal standard. Such an argument must initially fail, because the opinion of the Fifth Circuit reveals no adoption of any standard, either liberal or conservative. In addition, adoption *vel non* of a standard is not the test, but whether a conflict of decisions exists.

The opinion of the Fifth Circuit creates no conflict of decisions. While plaintiffs have reviewed at least one decision from each circuit, that review establishes no conflict. Rather, the review demonstrates that all courts of appeal recognize the propriety of mandamus for a clear abuse of discretion, although variously expressed in some courts of appeal. However stated, the question here becomes whether a district court clearly abused its discretion.

The presence of clear abuse and the absence of the adoption of any new standard are indicated by the operative facts applied to decisions of the Fifth Circuit. The case of *Koehring Company v. Hyde Construction Co.*, 324 F.2d 295 (5th Cir. 1963) demonstrates the standard in the Fifth Circuit. There the Fifth Circuit tested for an abuse of discretion by applying the three elements of 28 U.S.C. §1404(a). The Fifth Circuit cited as authority the case of *Chicago, R.I. & P.R.Co. v. Igoe*, 212 F.2d 378 (7th Cir. 1954), the case most factually identical to this case. Juxtaposing the facts here present, with those in *Koehring* and *Igoe*, rejects both the adoption of any liberal standard or a conflict of decisons.

Factually pertinent in this case was the almost total absence of any connection with the Eastern District of Texas. Other than the choice of forum — in reality, the choice of plaintiffs' counsel — absolutely no connection with the Eastern District existed until shortly prior to the hearing of the renewed motion to transfer. To this must be added the three potential witnesses local to the Eastern District, contacted by plaintiffs immediately prior to the hearing on the renewed motion. Employing a local doctor, a life insurance salseman and a person with knowledge of tires, hardly supplies sufficient nexus to the Eastern District where all of the operative facts occurred in the Northern District. After all, as counsel for plaintiffs admitted, persons with the same qualifications could be readily found in the Northern District. With no substantial or material connection with the Eastern District, the Fifth Circuit justifiably called this a case of "blatant forum shopping" (H-2).

Since preventing such forum shopping was exactly the purpose of 28 U.S.C. §1404(a), such a blatant example here present constitutes a clear abuse of discretion and rejects any conflict of decisions. Therefore, no important federal question remains unsettled and no conflict exists between any of the circuits or with this court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied and the grant of mandamus by the United States Court of Appeals for the Fifth Circuit upheld, with costs taxed to the plaintiffs.

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P.O. Box 2585
Lubbock, Texas 79408

Donald M. Hunt
Attorneys for Respondent

CERTIFICATE OF SERVICE

This brief has been served on petitioner/plaintiffs by mailing a copy to the attorneys of record, Broadus A. Spivey, SPIVEY AND GRIGG, P.O. Box 2011, Austin, Texas, 78768, on February 8, 1979.

Of The Firm

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CIVIL NO. M-77-72-CA

CYNTHIA ALLEN DAVIDSON, ET AL

vs.

COOPER TIRE AND RUBBER COMPANY

DEFENDANT'S RENEWED MOTION TO TRANSFER

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, COOPER TIRE AND RUBBER COMPANY, moves the Court to transfer this cause to the Northern District of Texas, Lubbock Division, pursuant to 28 USC §1404(a), on the following grounds:

1. Transfer to a more convenient forum, the Northern District of Texas, Lubbock Division, is justified on the grounds of convenience of the parties and witnesses and in the interests of justice. Transfer is also justified because venue is proper in the Northern District of Texas, Lubbock Division.

2. Venue is proper in the Northern District of Texas, Lubbock Division, pursuant to 28 USC §1391(a) because the accident which forms the basis of Plaintiffs' complaint occurred within the Northern District of Texas, Lubbock Division and because Defendant's registered agent for service of process,

CT Corporation Systems, has its office in Dallas, Texas within the United States District Court for the Northern District of Texas.

3. Transfer to a more convenient forum, the Northern District of Texas, Lubbock Division, is justified on the basis of the following facts:

(a) The accident in question occurred 5.8 miles north of Levelland, Texas on Farm Road 1294, in Hockley County, Texas, within the Northern District of Texas, Lubbock Division. (Deposition of R.C. Cheek, page 8, line 14 through page 10, line 4.)

(b) Following the accident, Plaintiff, Cynthia Allen Davidson, was hospitalized in Lubbock, Lubbock County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of Mrs. Nancy Allen, page 7, lines 16 through 19.)

(c) Plaintiff, Cynthia Allen Davidson, resides in Whiteface, Hockley County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of Cynthia Allen Davidson, page 5, lines 6 through 11.) Plaintiff, Ricky Davidson, resides in Whiteface, Hockley County, within the Northern District of Texas, Lubbock Division. (Deposition of Ricky Davidson, page 6, line 1 through page 8, line 20.) Plaintiff Dorman Allen, resides northwest of Abernathy, Lubbock County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of Dorman Allen, page 4, lines 6 through 24.)

(d) Defendant, Cooper Tire and Rubber Company, has no manufacturing or production facilities located in the Eastern District of Texas. Cooper Tire and Rubber Company's tire production facility located at Texarkana is in Miller County, Arkansas. (Affidavit of James Nowlin, attached hereto.)

(e) The tire which is the subject of this action was not built at Cooper Tire and Rubber Company's facilities in Texarkana, Arkansas. The type of Cooper brand tire which is the subject of this cause of action has never been built at the Cooper Tire and Rubber Company's facilities at Texarkana, Arkansas. (Affidavit of James Nowlin.)

(f) The tire in question contained a required identification number which indicated that the plant at which it was manufactured was in Findlay, Ohio. (Deposition of Mr. Joseph Davis, page 38, lines 21 through 24.)

(g) Plaintiff, Cynthia Allen Davidson, was treated after the accident by the following doctors. (Deposition of Mrs. Nancy Allen, page 7, line 21 through page 10, line 18.)

(1) Dr. Jack Dunn, Jr., who resides and practices in Lubbock, Lubbock, County, Texas, within the Northern District of Texas, Lubbock Division;

(2) Dr. Gordon Mayes, who resides and practices in Lubbock, Lubbock County, Texas, within the Northern District of Texas, Lubbock Division;

(3) Dr. Obie L. Stalcup, who resides and practices in Lubbock, Lubbock County, Texas, within the Northern District of Texas, Lubbock Division;

(4) Dr. Lester Wolcott, who practices with the Texas Tech University School of Medicine and who resides and practices in Lubbock, Lubbock County, Texas within the Northern District of Texas, Lubbock Division;

(5) Dr. Edward F. Thomas, who resides in Amarillo, Potter County, Texas and practices at the Biven Rehabilitation Hospital in Amarillo, Texas within the Northern District of Texas, Amarillo Division;

(6) Dr. Richard Kibbey, who resides and practices in

Amarillo, Potter County, Texas within the Northern District of Texas, Amarillo Division; and

(7) Dr. R. Paige, who resides and practices in Amarillo, Potter County, Texas within the Northern District of Texas, Amarillo Division.

(h) Plaintiff, Cynthia Allen Davidson's medical records are in Lubbock, Lubbock County, Texas within the Northern District of Texas, Lubbock Division and at the Bivens Rehabilitation Hospital in Amarillo, Potter County, Texas within the Northern District of Texas, Amarillo Division.

(i) The investigating officer, R.C. Cheek, resides in Levelland, Hockley County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of R.C. Cheek, page 5, lines 8 through 18.)

(j) Rebecca Bowden, a passenger in Cynthia Allen Davidson's vehicle when the accident occurred, permanently resides in Levelland, Hockely County, Texas within the Northern District of Texas, Lubbock Division, and presently resides in Canyon, Potter County, Texas within the Northern District of Texas, where she is going to school. (Deposition of Rebecca Bowden, page 7, lines 5 through 25.)

(k) Mr. Juan Rodriquez, an employee of Larry Beseda, originally purchased the tire in question for Mr. Beseda from Luper Tire Company. He resides in Levelland, Hockley County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of Juan Rodriquez, page 6, lines 4 through 6.)

(l) Mr. Larry Beseda, the original purchaser of the tire in question, resides in Whiteface, Cochran County, Texas, within the Northern District of Texas, Lubbock Division. (Deposition of Larry Beseda, page 5, line 18 and page 6, lines 8 through 14.)

(m) Luper Tire Company, the original vendor of the tire in question, has its principal place of business where the tire in question was purchased in Morton, Cochran County, Texas, within the Northern District of Texas, Lubbock Division. (Deposition of Larry Beseda, page 11, lines 3 through 6.)

(n) Dr. Raymond W. Mires, Plaintiffs' tire expert, resides in Lubbock, Lubbock County, Texas, within the Northern District of Texas, Lubbock, Division.

(o) Defendant intends to depose Bradley Webber, the employee of the Phillips 66 Station in Whiteface, Texas, who dismounted the tire in question after the accident. He resides in Whiteface, Cochran County, Texas, within the Northern District of Texas, Lubbock, Division.

4. The transfer of this cause of action to the Northern District of Texas, Lubbock Division, is further justified because the foregoing witnesses, all of whom are necessary for trial of this case, reside within the Northern District of Texas, Lubbock Division, and are beyond the subpoena power of this Court. The distance between Lubbock and Marshall is 476 miles. Transfer of this cause would avoid undue prejudice which will result from the unavailability of these witnesses who reside within the Northern District of Texas.

ON THESE PREMISES, Defendant, COOPER TIRE AND RUBBER COMPANY, moves this Court to transfer this cause of action to the Northern District of Texas, Lubbock Division, on the grounds stated herein.

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By /s/ Bernard P. Evans
Bernard P. Evans

Attorneys for Defendant

THE STATE OF TEXAS §
COUNTY OF LUBBOCK §

BEFORE ME, the undersigned authority in and for said county, Texas, personally appeared BERNARD P. EVANS as attorney for Cooper Tire and Rubber company, and, upon his oath, stated that he is attorney for Cooper Tire and Rubber Company, and that the facts, matters and allegations stated in Paragraph 2 above are true and correct.

/s/ Bernard P. Evans
BERNARD P. EVANS

SUBSCRIBED AND SWORN TO before me, by the said Bernard P. Evans, this 29th day of March, 1978, to certify which witness my hand and seal of office.

/s/ Ginger Burk
Notary Public in and for
Lubbock County, Texas

My commission expires 10-21-79

Ex A-7

STATE OF ARKANSAS)
) ss.
COUNTY OF MILLER)

James Nowlin, Affiant, being first duly sworn, says that he is employed by the Cooper Tire & Rubber company in the position of Plant Manager of Cooper Tire & Rubber Company's tire production facilities located in Texarkana, Miller County, Arkansas. Affiant further states that he has been employed with Cooper Tire & Rubber Company for seven years and has personal knowledge involving the information stated herein. Affiant further states that the tire which is the subject of the above-captioned case was not built at Cooper Tire & Rubber Company's facilities at Rt. 12, Box 252, Texarkana, Miller County, Arkansas. And Affiant further states that this type of Cooper brand tire has never been built at the Cooper Tire & Rubber Company's facilities at Rt. 12, Box 252, Texarkana, Miller County, Arkansas.

And further Affiant saith naught.

/s/ James Nowlin
James Nowlin

Sworn to before me and subscribed in my presence this 10th day of March, 1978.

/s/ (illegible)
Notary Public

Ex A-8

AFFIDAVIT IN SUPPORT OF
DEFENDANT'S RENEWED MOTION TO TRANSFER

In support of Defendant, COOPER TIRE AND RUBBER COMPANY'S renewed motion to transfer the above numbered cause to the Northern District of Texas, Lubbock Division, pursuant to 28 U.S.C. §1404(a), the undersigned affiant, as attorney for Defendant, being duly sworn, states the following:

1. I have read the foregoing motion and believe all of the facts stated therein to be true and correct.

2. The attorney for Plaintiffs who has appeared at all depositions and participated in all discovery on behalf of the Plaintiffs, Mr. Broadus Spivey, resides and practices in Austin, Travis County, Texas, which is in the United States District Court for the Western District of Texas, Austin Division. Scott Baldwin, whom Mr. Spivey has associated as attorney for Plaintiffs, has not participated in any of the discovery. Mr. Baldwin, who lives and practices in Marshall, Harrison County, Texas, is the Plaintiffs' only connection with the United States District Court for the Eastern Division of Texas, Marshall Division.

/s/ Bernard P. Evans
BERNARD P. EVANS

SUBSCRIBED AND SWORN TO BEFORE ME by the said BERNARD P. EVANS, this the 29th day of March, 1978, to certify which witness my hand and seal of office.

/s/ Karol McVay
Notary Public in and for
Lubbock County, Texas

My Commission expires: 12-31-78